Google Inc. et al v. Egger et al Doc. 327 Att. 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CENTER FOR CONSTITUTIONAL RIGHTS, TINA M. FOSTER, GITANJALI S. GUTIERREZ, SEEMA AHMAD, MARIA LAHOOD, RACHEL MEEROPOL,	)	Case No. 06-cv-313
Plaintiffs,	)	Hon. Gerard E. Lynch
v.	)	
GEORGE W. BUSH, President of the United States; NATIONAL SECURITY AGENCY, LTG Keith B. Alexander, Director; DEFENSE INTELLIGENCE AGENCY, LTG Michael D. Maples, Director; CENTRAL INTELLIGENCE AGENCY, Michael Hayden, Director; DEPARTMENT OF HOMELAND SECURITY, Michael Chertoff, Secretary; FEDERAL BUREAU OF INVESTIGATION, Robert S. Mueller III, Director JOHN D. NEGROPONTE Director of National Intelligence,	)	
Defendants.	)	

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 4

I. PLAINTIFFS' ALLEGATIONS ARE INSUFFICIENT TO ESTABLISH THEIR STANDING AND, IN ANY EVENT, STATE SECRETS WOULD BE NECESSARY TO DETERMINE WHETHER PLAINTIFFS HAVE STANDING 4

A. Plaintiffs' Allegations Are Insufficient to Establish Standing 4

B. Plaintiffs Cannot Establish Standing Without State Secrets 9

II. PLAINTIFFS MISREPRESENT THE NATURE AND IMPACT OF THE STATE SECRETS PRIVILEGE ON THIS CASE 10

A. The State Secrets Privilege Has Not Been Used Here to Immunize Executive Branch Actions 11

B. The State Secrets Privilege is Far More Than a Narrow Evidentiary Privilege Applicable to Discovery Disputes 12

C. Whether the "Very Subject Matter" of this Case is a State Secret Turns on the Evidence Needed to Decide The Case 16

1. Dismissal is Not Limited to *Totten* Doctrine Cases 16

2. Whether the "Very Subject Matter" is a State Secret Turns on Whether State Secrets Are Inherently Required to Decide the Case 17

3. Public Disclosure of Some Information Does Not Preclude Dismissal on State Secrets Grounds . . . .

4. Plaintiffs Misrepresent Other National Security Cases that Purportedly Proceeded 18

III. FISA DOES NOT SUPPLANT THE STATE SECRETS PRIVILEGE IN CASES INVOLVING ALLEGED UNLAWFUL SURVEILLANCE 26

A. FISA Section 1806 is Inapplicable To This Case 27

B. FISA Section 1806 Does Not Preempt the State Secrets Privilege 28

1. The State Secrets Privilege Reflects the President's Constitutional Authority over National Security and Foreign Affairs and, thus, is Constitutionally Based 28

2. Nothing in FISA Indicates Clear Congressional Intent to Preempt the Constitutionally-Based State Secrets Privilege 30

IV. THE EVIDENCE NEEDED TO ADDRESS PLAINTIFFS' CLAIMS IS SUBJECT TO THE STATE SECRETS PRIVILEGE 34

A. Plaintiffs' Challenge to the President's Authority to Establish the TSP Raises Significant Fact Issues and State Secrets Are Necessary to Resolve This Claim 34

1. Assessing the President's Inherent Authority to Undertake Foreign Intelligence Surveillance Would Require the Disclosure of State Secrets 34

2. Plaintiff's Statutory Claim Likewise Does Not Involve Purely Legal Questions but Implicates State Secrets 38

B. Plaintiffs' Fourth Amendment Claim Raises Significant Fact Issues and State Secrets Are Necessary to Resolve This Claim 40

V. ALTERNATIVES TO DISMISSAL THAT PLAINTIFFS SUGGEST ARE UNSUPPORTED IN LAW AND WOULD BE UNWORKABLE HERE 44

VI. THE STATUTORY PRIVILEGES INVOKED IN THIS CASE FURTHER PROTECT THE STATE SECRETS AT ISSUE 46

VII. DEFENDANTS' SUBMISSIONS ARE THE ONLY APPROPRIATE RESPONSE TO PLAINTIFFS' SUMMARY JUDGMENT MOTION 50

CONCLUSION 54

INTRODUCTION

Plaintiffs' Opposition to Defendants' Motion to Dismiss or for Summary Judgment (hereafter "Pls. Opp" and "Defs. Mem.") emphasizes rhetoric over analysis. Plaintiffs characterize the matter at issue—the President's establishment of the Terrorist Surveillance Program ("TSP") to identify and prevent terrorist attacks by the al Qaeda network—as "criminal conduct." Pls. Opp. at 13. Plaintiffs contend that the state secrets privilege has been asserted here in order to hide violations of law. *See id.* at 1, 39. And, in a theme that pervades their brief, Plaintiffs assert that dismissal of this case on state secrets grounds would render the Court "subservient to executive whim," undermining "not only our constitutional system of checks and balances, but the rule of law itself." *Id.* at 2, 13. Neither the tone nor substance of Plaintiffs' presentation addresses the key issues before the Court in a meaningful fashion.

The state secrets privilege has not been asserted in this case to hide criminal conduct. After the 9/11 attacks, the President authorized the National Security Agency ("NSA") to intercept international communications to and from the United States where at least one party is reasonably believed to be a member or agent of al Qaeda or an affiliated terrorist organization. The President did so in order to address an extraordinary need to obtain intelligence information as rapidly and effectively as possible to prevent future catastrophic terrorist attacks. Plaintiffs challenge the authority of the President to protect the Nation through the TSP. They refuse to acknowledge, however, the obvious dilemma raised by their claims and motion for summary judgment: that the adjudication of a foreign intelligence program such as the TSP requires the disclosure of highly classified intelligence information that could help al Qaeda and other adversaries avoid detection.

Plaintiffs also consistently mischaracterize authority regarding the state secrets privilege.

In particular, their argument that the very subject matter of this case is not a state secret because the existence of the TSP is now public misapprehends the standard at issue. Whether this case may proceed turns on whether the evidence necessary to decide the claims implicates facts that must remain secret in the interests of national security. This is not a mere discovery dispute that touches on classified facts, in contrast to so many of the cases on which Plaintiffs rely. Even if Plaintiffs think that *they* can proceed on a scant public record, Defendants are not able to present a full defense to Plaintiffs' claims without classified information.

With respect to the fundamental issue of their standing, Plaintiffs cannot (and do not attempt to) point to any direct action taken or threatened against them by the Government. Instead, Plaintiffs argue that they have standing because the existence of the TSP has had a chilling effect on their communications. But the TSP is not akin to a statute or regulation that imposes a proscription on Plaintiffs such that standing is established by the mere existence of the program. Plaintiffs simply speculate that they are more likely to be subject to surveillance—an argument that courts have previously rejected. Plaintiffs' alleged injuries are the result of their own subjective reaction, and the reaction of others not before the court, not to any cause that is fairly traceable to the Government. Beyond this, the ultimate problem with Plaintiffs' standing is that facts necessary to assess the matter—facts that would either confirm or deny the existence of surveillance of Plaintiffs, or that would delineate the operation of the program to assess whether Plaintiffs' fear of surveillance is credible or not—cannot be disclosed without causing serious harm to national security.

With respect to the impact of the state secrets privilege on the merits of Plaintiffs' claims, the beginning and end of Plaintiffs' analysis is that the Foreign Intelligence Surveillance Act, 50

U.S.C. § 1801 *et seq.* ("FISA"), governs under any circumstance, no matter the exigent circumstances faced by the President in protecting the Nation from attack. This inflexible view is plainly wrong. Long-standing authority recognizes some inherent Presidential power to conduct foreign intelligence surveillance, and the application of that authority to this case turns on the particular facts at issue—facts that are highly classified and cannot be disclosed.

Finally, Plaintiffs' contention that any ruling in Defendants' favor would render the Court subservient or negate constitutional checks and balances is specious. Defendants' position is based on an application of long-standing and well-recognized judicial authority which acknowledges that, in some circumstances, lawsuits must be dismissed where they inherently put at issue sensitive classified activities. The law has consistently struck a balance in favor of protecting the Nation's security in cases such as this. Moreover, in support of the privilege assertions, Defendants have provided the Court with broad details concerning the activities at issue in this lawsuit, how they are implicated by the specific claims in the case, and why the case cannot proceed without causing harm to national security. It is not an abdication of Court's responsibility to hold, for the reasons Defendants have demonstrated, that dismissal of this case is necessary to protect vital national security interests. As set forth herein and in Defendants' prior submissions, the proper course here is dismissal of the case.[1]

[1] In addition to the arguments set forth below, Defendants refer the Court to their prior classified, *in camera*, and *ex parte* submissions for a further discussion of how state secrets are implicated and risked by the adjudication of this case.

ARGUMENT

I. PLAINTIFFS' ALLEGATIONS ARE INSUFFICIENT TO ESTABLISH THEIR STANDING AND, IN ANY EVENT, STATE SECRETS WOULD BE NECESSARY TO DETERMINE WHETHER PLAINTIFFS HAVE STANDING

A. Plaintiffs' Allegations Are Insufficient to Establish Standing

As set forth in Defendants' opening brief, Plaintiffs' allegations are facially insufficient to establish standing because they amount to nothing more than a purported subjective chilling effect and thus are foreclosed by *Laird v. Tatum*, 408 U.S. 1 (1972). *See* Defs. Mem. at 18-24. In particular, Defendants explained that Plaintiffs' claim of a chill is patently unreasonable because it applies to communications with a category of people significantly broader than those potentially subject to the TSP; that even with respect to communications Plaintiffs might have with members or affiliates of al Qaeda, any alleged chilling effect is still insufficient because the TSP does not necessarily apply to those communications; and that Plaintiffs cannot reasonably claim that they are chilled by the TSP, because they must always assume the risk that international communications involving al Qaeda or affiliated terrorist groups may be subject to monitoring by other means or entities. *See id.*

Plaintiffs do not adequately rebut these critical points. As an initial matter, Plaintiffs continue to assert a chilling effect with respect to communications well outside the potential scope of the TSP. They continue, for example, to make the general and vague allegations that they cannot assure their "clients, witnesses, or others" that their conversations are confidential, and that "persons with whom they seek to communicate" have been deterred from speaking to Plaintiffs due to their own fear of monitoring. Pls. Opp. at 2. Even with respect to their specific allegations, Plaintiff Maria LaHood claims to be chilled in conversations with "Canadian attorneys" representing a terrorism suspect, *see* Affirmation of Maria LaHood ¶ 7, and William Goodman claims that the TSP has hindered CCR's ability to communicate with family members of detainees, "foreign witnesses, experts, and human rights advocates," *see* Affirmation of William Goodman ¶¶ 4-6. Such broad statements of fear cannot be reasonably or fairly traced to the existence of the TSP.

Plaintiffs fare no better with respect to any communications that they may have with members or agents of al Qaeda or affiliated terrorist organizations. Plaintiffs spend much time attempting to distinguish *Laird* by citing a number of cases in which a chilling effect or an injury of "professional harm" was deemed sufficient to confer standing.[2] *See* Pls. Opp. at 3-10. But in focusing on such cases, Plaintiffs miss the key point. *Laird* did not hold, and Defendants have not suggested, that a chilling effect or a burden on professional activities is never sufficient to establish standing. Indeed, *Laird* expressly acknowledged that prior cases had held that constitutional violations may arise from the deterrent effect of governmental regulations "that fall short of a direct prohibition against the exercise of First Amendment rights." 408 U.S. at 11. But the Court went on to hold that such decisions "have in no way eroded the established principle" that "to invoke the judicial power to determine the validity of executive or legislative action [an individual] must show that he has sustained, or is immediately in danger of sustaining, a direct injury *as the result of that action*." *Id.* at 13 (emphasis added) (internal quotation marks omitted). The Court thus explained that for a chilling effect claim to be justiciable, the

[2] Notably, even as to their allegations of communications with terrorism suspects, Plaintiffs appear to abandon any claim of actual interception and instead rely solely on the alleged chill of their communications. In fact, Plaintiffs claim (erroneously) that whether they are actually subject to TSP surveillance is irrelevant to their standing. *See* Pls. Opp. at 31.

challenged exercise of governmental power must be "regulatory, proscriptive, or compulsory in nature," and the complainant must be "either presently or prospectively subject to the regulations, proscriptions, or compulsions that he [is] challenging." *Id.* at 11.

As Defendants have explained, Plaintiffs cannot satisfy such a requirement in this case because, unlike a criminal statute to which all individuals are necessarily subject, the TSP does not necessarily apply to communications that Plaintiffs may have with al Qaeda member or affiliates. Thus, Plaintiffs' alleged chilling effect is not fairly traced to the challenged program.[3] *See* Defs. Mem. at 22-23. Instead of addressing that fundamental problem with their claims, Plaintiffs simply cite cases in which the complainant *was* clearly subject to the challenged action, such as *Meese v. Keene*, 481 U.S. 465, 472-76 (1987) (individual challenged actual application of Foreign Agents Registration Act to films he wished to exhibit); *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 520-21 (9th Cir. 1989) (churches challenged actual government surveillance of their services); *Latino Officers Ass'n v. Safir*, 170 F.3d 167 (2d Cir. 1999) (police officers challenged Department procedure which restricted their public statements); and *Jabara v. Kelley*, 476 F. Supp. 561 (E.D. Mich 1979) (government admitted investigating and surveilling plaintiff over course of eight years). These cases only sharpen the contrast between the uncertainty of the application of the TSP in this case and the clear applicability of the challenged governmental action in cases previously deemed justiciable.

Plaintiffs also attempt to belittle *Laird*, claiming that it "stands for nothing more" than the narrow proposition that allegations of subjective chill do not confer standing if they are based on only the fear that the Government "might in the future" make unlawful use of information lawfully gathered. Pls. Opp. at 7. That is clearly a substantial understatement of the Court's holding. Indeed, the reference in *Laird* to the plaintiffs' "speculative apprehensiveness that the Army may at some future date misuse the information in some way that would cause [them] direct harm," is merely one example in a list of inadequacies with the allegations at issue. 408 U.S. at 13. The Court went on to hold, without reservation, that "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Id.* at 13-14. It is for this reason that the major cases involving general challenges to intelligence-gathering programs—*United Presbyterian Church v. Reagan*, 738 F.2d 1375 (D.C. Cir. 1984), and *Halkin v. Helms* (*Halkin II*), 690 F.2d 977 (D.C. Cir. 1982)—squarely rejected chilling effect claims similar to those here. *See* Defs. Mem. at 20-21. Indeed, Plaintiffs inexplicably fail to even mention *United Presbyterian*, which expressly rejected the precise argument that Plaintiffs assert in erroneously attempting to limit the applicability of *Laird* to cases that do not involve allegations of unlawful surveillance. *See United Presbyterian*, 738 F.2d at 1379 (rejecting the claim that *Laird* did not apply to allegations of illegal, as opposed to otherwise lawful, surveillance and holding instead that *Laird* is "clear and categorical" that allegations of subjective chill are inadequate). Both cases, moreover, specifically rejected the notion that a plaintiff may gain standing merely because he is more likely than others to be surveilled due to his activities—a notion on which Plaintiffs' claims here depend. *See United Presbyterian*, 738 F.2d at 1377, 1380; *Halkin II*, 690 F.2d at 1002 & n.89; *see also* Defs. Mem. at 20-21.

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[3] As discussed below, whether or not a particular individual or communication is actually subject to the TSP cannot be confirmed or denied without causing grave harm to the national security. Therefore, such information is protected by the state secrets privilege.

Plaintiffs stress that some of their injuries have nothing to do with their own subjective fears, but instead are caused when *other individuals* are chilled in communicating with them. *See* Pls. Opp. at 10. This argument only weakens Plaintiffs' claims. If Plaintiffs' speculative fear of surveillance is inadequate to establish standing absent facts demonstrating the applicability of the TSP to their communications, then certainly the subjective fear of a third party not before the Court is an even more attenuated and insufficient claim of injury.

Finally, Plaintiffs offer a strained and unavailing response to the fundamental point that, due to the ordinary risk that international communications with al Qaeda members, agents, and affiliates are subject to monitoring by other methods or entities, the TSP cannot cause Plaintiffs or others any reasonable chill when engaging in such communications. Plaintiffs primarily argue that the TSP introduced a greater risk of interception because "all [prior] interceptions were subject to judicial oversight." Pls. Opp. at 11; *see also* Meeropol Affirmation ¶ 4 ("Prior to the government's acknowledgment of the [TSP], I understood that all authorized means of government electronic surveillance involved judicial review."). But that is something Plaintiffs could not possibly know. It is also a clear overstatement that does not take into account exceptions for warrantless surveillance authorized by statute or consistent with the Fourth Amendment, or even the potential surveillance of international communications by foreign governments. Moreover, the notion that Plaintiffs only first became concerned, after the acknowledgment of the TSP, that communications with al Qaeda suspects could be monitored seems rather contrived. *See* LaHood Affirmation ¶ 4 ("Although I cannot be sure that our communications are not intercepted under FISA, I am much more concerned knowing that surveillance under the NSA program is not subject to any judicially enforced restrictions or judicial review."). Indeed, although Plaintiffs point to the minimization procedures in effect under FISA, *see* Pls. Opp. at 11, Plaintiffs have no concrete basis to know that the TSP poses any greater risk to the interception of their international communications with al Qaeda suspects, or has any fewer minimization protections, than does the interception of such communications under FISA or by a foreign government or other entity.

B. Plaintiffs Cannot Establish Standing Without State Secrets

Even if Plaintiffs' Complaint sufficiently *alleged* standing, Plaintiffs could not ultimately establish standing—nor could Defendants disprove standing—without information subject to the state secrets privilege. *See* Defs. Mem. at 24-27. As previous courts have held in similar cases, such a result requires the dismissal of a plaintiff's claim. *See Halkin II*, 690 F.2d at 999, 1001; *Ellsberg v. Mitchell*, 709 F.2d 51, 65 (D.C. Cir. 1983).

Plaintiffs respond by arguing that they do not need to prove that they are actually subject to surveillance in order to establish standing and that there is not any evidence that Defendants could present that would disprove standing. Indeed, Plaintiffs pointedly state that "[t]here are *no additional facts* that the government could produce—privileged or otherwise—that would defeat Plaintiffs' standing." Pls. Opp. at 32 (emphasis added). Such an extreme position cannot be credited. To take a hypothetical example, it cannot be the case that Plaintiffs could maintain this action if Defendants were able to come forward with evidence demonstrating that Plaintiffs' communications with their clients had never been subject to interception under the TSP and were unlikely to be subject to any such interception in the future. Defendants, however, could not present such facts (if they existed), or other facts that might undercut Plaintiffs' standing, without causing harm to the national security. *See* Public Negroponte Decl. ¶ 12.

Likewise, Plaintiffs' abandonment of any claim alleging actual surveillance of their communications and their assertion instead of a pure chilling effect claim does not allow them to avoid any showing that they are actually subject to the TSP. Although Plaintiffs attempt to distinguish the decisions in *Halkin I* and *Halkin II*, the holdings of those cases are quite clear: that the plaintiffs' "inability to adduce proof of actual acquisition of their communications . . . prevents them from stating a cognizable claim in the federal courts." *Halkin II*, 690 F.2d at 998; *see also id.* at 1001 (stating that plaintiffs' allegations could "only be a matter of speculation" in the absence of their ability to prove actual interception of their communications). Plaintiffs' claims here suffer from the same fatal flaws, and Plaintiffs cannot chart their way around fundamental Article III requirements through artful pleading.

II. PLAINTIFFS MISREPRESENT THE NATURE AND IMPACT OF THE STATE SECRETS PRIVILEGE ON THIS CASE

Rather than addressing how the state secrets privilege applies to the facts and claims at issue in *this* case, Plaintiffs spend considerable time attempting to reframe the debate. They describe the privilege as a "narrow" evidentiary rule used typically to deal with discovery disputes that do not require dismissal, *see* Pls. Opp. at 17-21, and they assert that the application of the privilege here "would preclude judicial review and immunize executive action," *id.* Yet Plaintiffs ultimately acknowledge that the law requires precisely what Defendants have stated: that a case must be dismissed where its very subject matter is a state secret, where state secrets are needed for a plaintiff to present their *prima facie* case, or where state secrets are necessary for defendants to present their defense. *See* Pls. Opp. at 20; Defs. Mem. at 16. After citing numerous applications of the privilege, some plainly misrepresented, others plainly inapposite, Plaintiffs' contention that dismissal is not warranted here is unavailing.

A. The State Secrets Privilege Has Not Been Used Here to Immunize Executive Branch Actions

Plaintiffs' first assertion is that the Government's application of the state secrets privilege would "immunize" executive action. Pls. Opp. at 14. They contend the "government's theory" is that the "Executive could escape accountability for any illegal action by taking refuge in the state secrets doctrine," and thereby "disable, by unilateral fiat, the power of Article III courts to the the ultimate arbiters of the law and the Constitution." *Id.* This is not the Government's "theory" at all. Defendants' position is based on a straightforward application of a long-recognized constitutionally-based privilege. Plaintiffs have challenged a program to collect foreign intelligence information related to the al Qaeda threat because they believe it exceeds the President's authority and violates their constitutional rights. Intelligence gathering activities, however, are inherently secret—indeed, they are protected by broad statutory privileges. *See* 50 U.S.C. § 402; 50 U.S.C. § 403-1(i)(l); *see also* 18 U.S.C. § 798(a)(3). Thus, it should have been apparent from the outset that this case would implicate secrets regarding intelligence-gathering methods. Defendants' response to Plaintiffs' claims has been two-fold: first to protect critical intelligence information, sources, and methods; and, second, to demonstrate why the necessary exclusion of this information prevents a fair adjudication of the claims, including the threshold issue of Plaintiffs' standing.

The notion that, by these positions, Defendants seek to avoid Executive accountability for "any illegal action" and disable the power of the courts "by unilateral fiat" is meritless. Defendants have provided this Court with substantial evidence and detail concerning the matters at issue, and have explained why Plaintiffs' claims cannot be adjudicated without state secrets. This case is a straightforward, albeit significant, application of the privilege. The numerous cases Plaintiffs cite where executive action has been subject to judicial review, including recent cases concerning post-9/11 actions, underscores that the Executive branch does not routinely use the state secrets privilege to preclude judicial review of important policies bearing upon national security matters. *See* Pls. Opp. at 16 (citing *Hamdi v. Rumsfeld*, 542 U.S 507 (2004); *Hamdan v. Rumsfeld*, 2006 WL 1764763 (June 29, 2006)).

B. The State Secrets Privilege is Far More Than a Narrow Evidentiary Privilege Applicable to Discovery Disputes

Plaintiffs next contend that the state secrets privilege is a narrow evidentiary privilege that concerns primarily whether certain information must be excluded in connection with discovery requests. *See* Pls. Opp. at 18-19. That is hardly an apt description. The Supreme Court has observed that this privilege derives from the President's Article II powers to conduct foreign affairs and provide for the national defense. *United States v. Nixon*, 418 U.S. 683, 710 (1974). It is, moreover, an absolute privilege that cannot be overcome by a showing of need, *see United States v. Reynolds*, 345 U.S. 1, 11 (1953);[4] accordingly, it "heads the list" of privileges,

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[4] Plaintiffs assert in a footnote that "[r]ecently disclosed facts regarding the *Reynolds* litigation show that strong judicial oversight in state secrets cases is an absolute necessity" because "the government misled the Court" in *Reynolds* as to the need for protecting an accident report of an Air Force crash in order to "cover up its own negligence." *See* Pls. Opp. at 222 n.20 (citing *Herring v. United States*, 2004 WL 2040272 (E.D. Pa. 2004)). The very district court opinion Plaintiffs cite categorically rejects their own assertion. The court found that the Air Force did *not* "misrepresent the truth or commit a fraud on the court." *Herring*, 2004 WL 2040272, at *5 (emphasis added); *see also id*. at *6. The court observed that the state secrets assertion in *Reynolds* was not limited to protecting certain sensitive equipment on the aircraft, but extended to details of the B-29's operation and performance. *See id.* The court explained precisely why disclosure of the information contained in the accident report would have caused harm to national security by revealing flaws in the B-29, in particular because the Soviets had come into possession of the aircraft and built a replica capable of carrying nuclear weapons (the Tu-4) that had the very same flaws. *See id*. at 9. The district court observed that the report "may have been of great moment to sophisticated intelligence analysts and Soviet engineers alike." *Id.*
(continued...)

Halkin v. Helms, 598 F.2d 1, 8 (D.C. Cir. 1978) ("*Halkin I*"), and is "of the highest dignity and significance." *El-Masri v. Tenet* (No. 1:05CV1417), 2006 WL 1391390, at *4 (E.D. Va. May 12, 2006). Furthermore, the law is also clear that a case must be dismissed when state secrets are so "central to the subject matter of the litigation that any attempt to proceed will threaten" their disclosure, or where state secrets are needed by the parties to address the claims. *See Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 1547 (2d Cir. 1991); *Fitzgerald v. Penthouse Int'l, Ltd.*, 776 F.2d 1236, 1242 (4th Cir. 1985). Thus, the privilege clearly extends beyond individual discovery disputes to the fundamental question of whether the case itself is appropriate for resolution.

The fact that the privilege often arises simply to protect information from disclosure in discovery, *see* Pls. Opp. at 19-20 & n.19, is neither surprising nor dispositive here. It stands to reason that there would be more applications of the privilege in the context of particular discovery disputes, as few lawsuits are brought that directly challenge the lawfulness of classified activities. But the federal reporter contains numerous cases in which the state secrets privilege required dismissal. *See Sterling v. Tenet*, 416 F.3d 338, 347-48 (4th Cir.), *cert. denied*, 126 S. Ct. 10521 (2005); *Kasza v. Browner*, 133 F.3d 1159, 1167-68 (9th Cir.), *cert. denied*, 525 U.S. 967 (1998); *Zuckerbraun*, 935 F.2d at 1547; *Weston v. Lockheed Missiles & Space Co.*, 881 F.2d 814, 816 (9th Cir. 1989); *Farnsworth Cannon, Inc. v. Grimes*, 635 F.2d 268, 281 (4th Cir. 1980) (en banc); *Molerio v. FBI*, 749 F.2d 815, 819, 822 (D.C. Cir. 1984); *El-Masri*, 2006 WL 1391390, at *6; *Edmonds v. U.S. Department of Justice*, 323 F. Supp. 2d 65, 77-82 (D.D.C.

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[4](...continued)
The district court's findings were upheld by the Third Circuit. *See Herring v. United States*, 424 F.3d 384 (3rd Cir. 2005).

2004), *aff'd*, 161 Fed. Appx. 6, 045286 (D.C. Cir. May 6, 2005) (*per curiam* judgment), *cert. denied*, 126 S. Ct. 734 (2005); *Maxwell v. First National Bank of Maryland*, 143 F.R.D. 590, 598-99 (D. Md. 1992), *aff'd*. 998 F.2d 1009 (4th Cir. 1993), *cert. denied*, 510 U.S. 1091 (1994); *Nejad v. United States*, 724 F. Supp. 753 (C.D. Cal. 1989).

In any event, the relative number of cases that are allowed to proceed, or instead are dismissed as a result of state secrets, has no bearing on whether *this* case may proceed. Plaintiffs significantly mischaracterize the cases on which they rely, none of which involved a challenge to the lawfulness of a classified foreign intelligence program, but concerned instead distinct legal claims (many not even against the Government) that could proceed because the state secrets at issue were not among the evidence necessary to decide those claims. *See* Pls. Opp. at 19-20 and n.19. For example, Plaintiffs' assertion that *Jabara v. Webster*, 691 F.2d 272 (6th Cir. 1982), *cert. denied*, 464 U.S. 863 (1983), was decided on the merits after the state secrets privilege was asserted is highly misleading. *See* Pls. Opp. at 19 n.19, 27. In that case, the state secrets privilege was asserted, as here, over facts involving the acquisition by the NSA of overseas telegraphic communications. *See Jabara v. Kelly*, 75 F.R.D. 475 (E.D. Mich. 1977). Once privilege was asserted and upheld, the case did *not* proceed on this matter. Instead, the case proceeded on a separate claim as to which the state secrets privilege was not asserted, namely whether the Federal Bureau of Investigation ("FBI") improperly received information from NSA. *See Jabara v. Kelly*, 476 F. Supp. 561 (E.D. Mich. 1979). Moreover, even as to that surviving claim, the Court of Appeals ultimately reversed a judgment in the plaintiff's favor because he had not challenged the NSA intercept program (which was protected by the state secrets privilege) and, accordingly, the transmission of information to the FBI did not violate the

Fourth Amendment. *See Jabara v. Webster*, 691 F.2d at 277-79. Thus, the successful assertion of the state secrets privilege in *Jabara* led to dismissal of the remaining claims.

Plaintiffs also neglect to follow *Clift v. United States*, 597 F.2d 826 (2d Cir. 1979), to its conclusion. In that case, the state secrets privilege was upheld to protect information concerning cryptographic devices, but the case was remanded in lieu of dismissal in the event that facts about the system eventually become declassified. What Plaintiffs neglect to mention is that, 12 years later, the facts still a secret, the case was dismissed on state secret grounds. *See Clift v. United States*, 808 F. Supp. 101 (D. Conn. 1991).[5]

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[5] *See also Monarch Assurance P.L.C. v. United States*, 244 F.3d 1356, 1364-65 (Fed. Cir. 2001) (in contract dispute between private parties, state secrets claim upheld and case proceeded to discovery of *non-government* witnesses on claimed authority of individual to contract for government); *Crater Corporation v. Lucent Technologies*, 255 F.3d 1361, 1370-71 (Fed. Cir. 2001) (in patent infringement action between private parties, court of appeals finds that case could proceed because evidence protected by privilege was not relevant to decide the claims), *cert. denied*, 535 U.S. 1073 (2002); *Foster v. United States*, 12 Cl. Ct. 492, 495-96 (Cl. Ct. 1987) (where state secrets assertion upheld to protect disclosure of information in a secret patent application, dismissal of action not addressed); *DTM Research L.L.C. v. AT&T Corp.*, 245 F.3d 327, 333-34 (4th Cir. 2001) (dispute involving misappropriation of trade secrets between two private companies could proceed where third party subpoenas to government quashed on state secrets grounds, since misappropriation claim could proceed without the evidence withheld); *Heine v. Raus*, 399 F.2d 785, 791 (4th Cir. 1968) (state secrets privilege *not asserted* as to central facts at issue in case—whether CIA authorized statement alleged to defame plaintiff—allowing case to proceed as to this fact).

Plaintiffs also misread *Attorney General of the United States v. The Irish People*, 684 F.2d 928 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1172 (1983). That case was brought *by the Government* to require a foreign agent to register, and the court of appeals reversed dismissal of the Government's case as a penalty for its protecting state secrets related to the Defendant. This scenario is inapposite here. Finally, the court in *In re United States*, 872 F.2d 472, 478 (D.C. Cir. 1989) remanded for the district court to consider the information as to which privilege was claimed on an item-by-item basis in light of the highly dated nature of the information at issue, which again is a circumstance not present here.

C. Whether the "Very Subject Matter" of this Case is a State Secret Turns on the Evidence Needed to Decide The Case

Plaintiffs next present two reasons why the very subject matter of this suit is not a state secret. First, they contend that this doctrine applies solely to rare circumstances involving alleged espionage agreements at issue in *Tenet v. Doe*, 544 U.S. 1 (2005) and *Totten v. United States*, 92 U.S. 105 (1875). *See* Pls. Opp. at 22-23. Second, Plaintiffs contend that the very subject of this case cannot be a state secret because the existence of the TSP has been publicly acknowledged; the Department of Justice has produced a White Paper explaining its legality; and the President and Vice President have also publicly discussed and defended the program. *See id.* at 23-27. These arguments lack merit.

1. Dismissal is Not Limited to *Totten* Doctrine Cases

To be sure, *Totten* and *Tenet* involved a particular type of classified activity that the Supreme Court has found deserving of special protection—secret espionage relationships between the Government and another party. The Court in *Tenet* stated that this rule was not merely an "early expression" of the state secrets evidentiary privilege under *United States v. Reynolds*, but a "categorical bar" to claims challenging such relationships. *Tenet*, 544 U.S. at 9. But Plaintiffs' suggestion that, absent the circumstances present in *Totten*, the state secrets privilege cannot serve as a basis for dismissal is clearly wrong, as numerous cases indicate. In *Reynolds* itself, the Supreme Court looked to *Totten* as an example of a case where the very subject matter of the action was a state secret. *See Reynolds*, 345 U.S. at 7 n.11 (citing *Totten*). Since then, numerous cases applying the state secrets privilege have cited *Totten* for the proposition that, where the very subject of a case is a state secret, it must be dismissed, even where alleged espionage agreements are not at issue. *See, e.g., Weinberger v. Catholic Action of*

Hawaii/Peace Ed. Project, 454 U.S. 139, 146-47 (1981) (citing *Totten* in dismissing a case where the Navy could not confirm or deny that it stored nuclear weapons at a facility); *Kasza*, 133 F.3d at 1170 (citing *Totten* in holding "very subject" of case a state secret to protect facts about an Air Force facility); *Zuckerbraun*, 935 F.2d at 547 (citing *Totten* in holding "very subject" of case a state secret to protect facts about missile defense system); *El-Masri*, 2006 WL 1391390 at *6 (citing *Totten* in holding"very subject" of case a state secret to protect facts about CIA rendition program).

2. Whether the "Very Subject Matter" is a State Secret Turns on Whether State Secrets Are Inherently Required to Decide the Case

Beyond their misunderstanding of the *Tenet-Totten* doctrine, Plaintiffs misconstrue what is meant by "the very subject matter" of a case being a state secret. The question is not whether the lawsuit concerns a matter that is publicly known—here, the existence of the TSP—but, whether any attempt to adjudicate the case would inherently put state secrets at issue.

Fitzgerald v. Penthouse Int'l. Ltd., 776 F.2d 1236, 1237 (4th Cir. 1985), provides a good example. At issue there was an alleged libel that the plaintiff, who worked on a secret Navy program for training marine mammals, sought to use his expertise for personal profit. *See id.* at 1237. After determining that certain facts concerning the program were state secrets which must be protected, the Fourth Circuit went on to analyze whether the case could proceed. Even though the existence of the program at issue was publicly known, *see id*. at 1242-43 (public declaration of the Secretary of the Navy describing marine mammal program), classified aspects of how the program operated would have been inherently at issue in any adjudication of the alleged libel. The Fourth Circuit observed that, "due to the nature of the question presented in this action *and the proof required* by the parties to establish or refute the claim, the very subject of this litigation is itself a state secret." *Id.* at 1243 (emphasis added). Relying in part on *Totten*, the court held that the subject of the case was a state secret because "the parties' ability to prove the truth or falsity of the alleged libel" either risked or depended on the disclosure of state secrets. *Id.; see also id.* at 1241-42 ("[I]n some circumstances sensitive military secrets will be so central to the subject matter of the litigation that any attempt to proceed will threaten disclosure of the privileged matters.").

Similarly, in *Zuckerbraun v. General Dynamics Corp.*, the Second Circuit upheld dismissal of an action brought against the manufacturer of a missile defense system by the family of a sailor killed when the U.S.S. Stark was struck by Iraqi missiles. *See* 935 F.2d at 547. The court concluded that the "very subject matter" of the case was a state secret because the proof need to address factual questions concerning the liability of the defendant was protected by the Government's assertion of the state secrets privilege. *Id*. at 548 (citing *Reynolds* and *Totten*); *see also Kasza*, 133 F.3d at 1169 (holding that the "very subject matter" of case was state secret because proof necessary for plaintiff to establish *prima facie* case and any further proceedings would jeopardize national security). Thus, whether the very subject matter of a case is a state secret turns on whether the proof inherently needed in the case implicates state secrets.

3. Public Disclosure of Some Information Does Not Preclude Dismissal on State Secrets Grounds

Plaintiffs are also quite mistaken in their contention that the very subject of the case is not a state secret because information about the matter is already in the public domain. *See* Pls. Opp. at 23. They cite in particular public discussion of the TSP in a Department of Justice White Paper, as well as a public defense of the program by the President, Vice President, and other officials in suggesting that state secrets cannot inherently be at issue in this litigation. *See id.* at

25-26. But such public statements have not revealed the classified facts over which privilege has been asserted—facts which are necessary to adjudicate Plaintiffs' claims. Thus, Plaintiffs' reliance on the tiresome analogy that Defendants seek to "close the barn door after the horse has already bolted," *see* Pls. Opp. at 24, is misplaced.[6]

Beyond this, the law is clear that public disclosure of some information about a classified activity does not preclude protection of additional underlying facts. *See Fitzgerald*, 776 F.2d at 1243 (protecting classified details of marine mammal program discussed in magazine article and acknowledged to exist by government); *El-Masri*, 2006 WL 1391390 (rejecting argument that the government's public affirmation of the existence of a program undercuts its assertion of privilege, noting "critical distinction" between a general admission that a program exists and the admission or denial of the specific facts at issue in the case); *Salisbury v. United States*, 690 F.2d 966, 971 (D.C. Cir. 1982) ("[B]are discussions by this court and the Congress of [the NSA's] methods generally cannot be equated with disclosure by the agency itself of its methods of information gathering"); *National Lawyers Guild v. Attorney General,* 96 F.R.D. 390 (S.D.N.Y. 1982) ("disclosure of an intelligence method or goal in a generalized way does not preclude protection of an intelligence method or goal which relates to a particular time and place and a particular target").

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[6] The district court in *Hepting v. AT&T*, 2006 WL 2038464 (N.D. Cal. July 20, 2006), found that the very subject matter of that case was not a state secret based in part on the Government's public acknowledgment of the existence of the TSP and other public statements by AT&T. *See id.* at * 11-13; *but cf. Terkel v. AT&T*, 2006 WL 2088202 (N.D. Ill. July 25, 2006) (dismissing on state secrets grounds action alleging that AT&T illegally provides to the NSA telephone records of millions of AT&T customers). Defendants believe the *Hepting* court's assessment of that matter is wrong and have petitioned for review by the Ninth Circuit. In particular, the *Hepting* court misapprehended the "very subject matter" inquiry as one that could be resolved by general public statements as opposed to the actual proof needed to address the case. In any event, even if the mere acknowledgment of the TSP were sufficient to infer that the main issue in *Hepting* (whether AT&T assisted in the TSP program) could proceed—a point the Government by no means concedes— the mere existence of the TSP is hardly a sufficient fact on which to adjudicate Plaintiffs' claims here. In addition, in denying the Government's motion to dismiss, the Court in *Hepting* improperly limited the *Totten* doctrine to cases solely between the participants to espionage contracts, contrary to numerous cases. The Court also failed to consider the threshold question presented in *Hepting* and here as well: that state secrets precludes Plaintiffs from proving whether they have been subject to surveillance and, thus, whether they have standing. *See Halkin II*, 690 F.2d at 998.

Plaintiffs' reliance in particular on the district court's decision in *Spock v. United States,* 464 F. Supp. 510 (S.D.N.Y. 1978), *see* Pls. Opp. at 17, 19, 26, is also unavailing. *Spock* involved allegations concerning a surveillance program that had terminated years before the court's decision. *See id.* at 513 n.4, 517. The Government specifically conceded that all of the plaintiff's allegations about the defunct program had become "a matter of public knowledge," except for the allegation that the plaintiff's own communications had been intercepted. *Id.* at 519. Concluding that the state secrets privilege was "rooted in the constitutional separation of powers" and "in the Article II powers of the executive," the court largely upheld the Executive's invocation of the privilege based on its *in camera, ex parte* review of a governmental affidavit. *Id.* at 518 & n.10. The court, however, accepted the plaintiff's assertion that the "one factual admission or denial" concerning whether the plaintiff's own communications were intercepted would "reveal no important state secret," and that the government's concern about "disclos[ing] additional information as the action progressed [was] somewhat premature" because the plaintiff indicated he could move for summary judgment if that single allegation were admitted. *Id.* at 519, 520. The court thus declined to dismiss the case where the "only" disclosure at issue was the bare admission or denial of a single allegation that, in the court's view, would not have caused harm to the national security in the particular circumstances of that case.[7]

The legal basis for the district court's conclusion that admitting or denying whether the *Spock* plaintiff had been surveilled is not clear from its opinion. The court's *in camera, ex parte* review of the Government's affidavit may underlie its ruling that "no important state secret" was involved with respect to this particular individual and a defunct, publicly disclosed program. *See* 464 F. Supp. at 519. In any event, the court's conclusion in *Spock* that the Government could confirm or deny the target of surveillance without harm to national security cannot apply in this case, where Plaintiffs challenge an ongoing terrorist surveillance program and their claims cannot be adjudicated without classified facts pertaining to covert intelligence activities.

In addition, to the extent *Spock* might be read as ruling that newspaper reporting of an alleged fact renders the state secret privilege inapplicable to that fact, *id.* at 519, 520, it likewise was wrongly decided. Such a rule would improperly place national security decisions in the hands of reporters whose sources often speculate as to government activity and whose reporting in any event will not always be presumed accurate or reliable by the public, and would require the United States to officially confirm or deny such reporting when the government has not previously done so. That outcome would largely eviscerate the state secrets privilege and is contrary to more recent, authoritative decisions which affirm the Government's right to protect national security information if the Government has not officially disclosed the precise information to the public. Even when alleged facts have been the "subject of widespread media and public speculation" based on "[u]nofficial leaks and public surmise," those alleged facts are not actually established in the public domain. *Afshar v. Department of State,* 702 F.2d 1125, 1130-31 (D.C. Cir. 1983); *see Terkel,* 2006 WL 2088202, at *14 (expressly disagreeing with the analysis in *Spock* and holding that media reports of alleged NSA programs "amount to nothing more than unconfirmed speculation"); *Hepting,* 2006 WL 203864, at *10-11 (court should not rely on media reports in assessing whether the very subject matter of the case was a state secret); *see also Fitzgerald,* 776 F.2d at 1242-43 (affirming dismissal because subject was state secret despite published article on the matter); *Edmonds v. FBI,* 272 F. Supp.2d 35, 49 (D.D.C. 2003) (because statements in the press were made by anonymous sources, even documents containing identical information may properly be withheld because "release would amount to official confirmation or acknowledgment of their accuracy").[8]

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[7] To the extent that the district court's decision in *Spock* could be read to imply that dismissal of a civil action is not a valid remedy to protect state secrets, such a notion has clearly been rejected by later cases, including by the Second Circuit. *See Zuckerbraun*, 935 F.2d at 547 (dismissal is "require[d]" in cases where invocation of the state secrets privilege "precludes access to evidence necessary for the plaintiff to state a prima facie claim," or "hampers the defendant in establishing a valid defense").

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[8] The *Turkmen* order cited by Plaintiffs is also inapposite, *see* Pls. Opp. at 24 (citing *Turkmen v. Ashcroft*, No. 02-CV-2307, 2006 WL 1517743 (E.D.N.Y. May 30, 2006)). The *Turkmen* litigation concerns the conditions of confinement that existed in two detention facilities over four years ago. The plaintiffs in *Turkmen* (represented by the Center for Constitutional Rights) sought discovery into whether their communications were monitored under the TSP in that particular case. In addition to objecting on relevancy grounds, the United States informed the magistrate judge precisely what we have advised this Court—that the Government could not confirm or deny whether particular individuals, including counsel for CCR who are Plaintiffs here, were subject to surveillance without tending to reveal classified information. Because the magistrate was attempting to design an alternative discovery approach that would satisfy the Government's national security concerns, it was not necessary for the Government to assert the state secrets privilege in that discovery dispute. *See id*. at * 2. The magistrate, however, decided ultimately to order the United States to disclose whether Government attorneys or witnesses in the case were aware of the very fact of any monitoring of plaintiffs' attorney-client communications. *See id.* The Government strongly disagrees with the decision, which is being reviewed by the district court. Notably, because it has not yet been necessary to assert the state secrets privilege in *Turkmen*, the magistrate judge's view was offered without the benefit of the kind of detailed showing presented to this Court as to the harm that confirming or denying

(continued...)

4. Plaintiffs Misrepresent Other National Security Cases that Purportedly Proceeded

Finally, Plaintiffs' assertion that other courts have adjudicated legal questions concerning foreign intelligence surveillance without confronting the state secrets privilege, *see* Pls. Opp. at 27, 30 n.33, again relies on inapposite authority that has no bearing on whether this case could be adjudicated. Plaintiffs' characterization of the *Halkin* litigation as proceeding through discovery before dismissal on state secrets grounds is quite inaccurate. *See* Pls. Opp. at 19 n.19, 27. In *Halkin I*, the Government immediately moved to dismiss on state secrets grounds to protect the very facts at issue in part here—whether the plaintiffs were subject to surveillance and the methods and techniques by which communications were intercepted. *See* 598 F.2d at 4-5. The Government also opposed discovery requests, and responded only to court-propounded inquires with a state secrets privilege assertion. *See id.* at 6. The district court upheld the claim of privilege and dismissed the case as to one surveillance program (called MINARET), but denied dismissal as to a separate program (called SHAMROCK) as to which some information had been made public in Congressional hearings. *See id*. at 5. The Court of Appeals upheld the privilege assertion and dismissal as to the MINARET program and reversed the district court and upheld the privilege assertion as to the SHAMROCK program. *See* 598 F.2d at 8-11. Specifically with respect to discovery, the Court of Appeals said:

> In the case before us the acquisition of plaintiffs' communications is a fact vital to their claim. No amount of ingenuity of counsel in putting questions on discovery can outflank the government's objection that disclosure of this fact is protected by privilege. Thus, in these special circumstances, we conclude that affording additional discovery for the government to parry plaintiffs' requests would be

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[8](...continued)
surveillance would entail.

fruitless. In camera resolution of the state secrets question was inevitable.

Halkin I, 598 F.2d at 6-7.

As a result of this ruling, the claims against the NSA challenging the alleged surveillance of the plaintiffs were dismissed on remand without any discovery. *See Halkin II*, 690 F.2d at 984. A separate claim proceeded against the CIA for allegedly providing "watchlisting" information to the NSA that was used to undertake surveillance. *See* 690 F.2d at 984. While some document discovery occurred as to the defunct surveillance program at issue, which had been the subject of a Congressional investigation, the CIA nonetheless successfully asserted the state secrets privilege as to several facts, including whether any of the plaintiffs' names had been submitted on any watchlists to the NSA. *See id.* at 985. The district court concluded that, since the very fact of any interception was protected by NSA's state secrets assertion, the plaintiffs would be unable to prove any liability on the part of CIA, and thus dismissed those claims. The Court of Appeals affirmed, again upholding the state secrets privilege to bar disclosure of the identities of individuals subject to surveillance, *see id.* at 988-89, 993 n.57, and affirming dismissal for lack of standing, *see id*. at 997-1000. *See also id.* at 998 ("Since it is the constitutionality of such interceptions that is the ultimate issue, the impossibility of proving that interception of any [plaintiffs'] communications ever occurred renders the inquiry pointless from the outset."). Thus, *Halkin II* likewise supports dismissal of claims challenging alleged surveillance on state secrets grounds and without discovery. Whatever discovery that did occur in *Halkin* was therefore irrelevant, because the threshold fact of whether the plaintiffs had been subject to surveillance could not be disclosed.

Plaintiffs' reliance on *Jabara v. Kelly*, 75 F.R.D. 475 (E.D. Mich. 1977), is likewise unfounded. Again in that case the court *upheld* an assertion of the state secrets privilege to bar discovery into whether the NSA had intercepted the plaintiffs' communications. *See id.* at 482, 492. The only fact that was unprotected in *Jabara* for future proceedings was the name of the agency (NSA) that conducted the program at issue, which had been published in a Senate report. *See id.* at 493. Here, there is no dispute that the TSP is a program conducted by the NSA. What is in dispute is whether the Government can confirm or deny its application to Plaintiffs here—the very facts that were protected by the court in *Jabara.*

Plaintiffs' suggestion that the court in *Molerio v. FBI*, 749 F.2d 815 (D.C. Cir. 1984) "resolved the claim on the merits" after evaluating privileged and non-privileged evidence, *see* Pls. Opp. at 21, 49, also is not accurate. In *Molerio*, the D.C. Circuit addressed the state secrets claim as a matter of summary judgment because that is how the case proceeded in district court. *See id*. at 820. But the court upheld the state secrets assertion as to all discovery "in gross," finding that the "whole object of the suit and of the discovery is to establish a fact that is a state secret." *See id.* at 821. Also, after finding that two claims could be resolved on the merits without state secrets, the court found that the effect of the state secrets privilege was to prevent the plaintiff's First Amendment claim "from proceeding." *See id.* at 825. Indeed, quite far from deciding the merits, the D.C. Circuit observed that "it would be a mockery of justice" for the court to proceed on this claim based on some circumstantial evidence knowing it was erroneous. *See id.* Only thereafter did the Court observe that the classified evidence did not support the plaintiff's claim and, thus, that dismissal was proper. *See id.* *Molerio* is thus hardly the kind of "merits determination" that supports proceeding in this case.[9]

III. FISA DOES NOT SUPPLANT THE STATE SECRETS PRIVILEGE IN CASES INVOLVING ALLEGED UNLAWFUL SURVEILLANCE

Plaintiffs' claim that FISA—in particular Section 1806(f)—overrides the state secrets privilege in this setting, *see* Pls. Opp. at 28-29, is wrong for a host of reasons. In sum, this provision was enacted for the benefit of the Government, and it is procedural in nature. It authorizes district courts, at the request of the Government, to protect classified information through *in camera, ex parte* review when a person has demanded discovery of FISA applications, orders, or related materials, or moves to suppress FISA-obtained or -derived information. But it does not purport to permit discovery to find out the very issue presented here—whether surveillance has occurred—nor does it trump the state secrets privilege as to whether and how that fact must be protected.

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[9] Other cases cited by Plaintiffs are plainly distinguishable. For example, several cases that Plaintiffs describe as involving judicial review of "covert or clandestine" programs involved decades-old, long since dormant and publicly disclosed programs, such as LSD experiments by the CIA in the 1950s, and the opening of mail to or from the Soviet Union between 1953 and 1973. *See* Pls. Opp. at 27 n.29 (citing *Kronisch v. United States*, 150 F.3d 112, 116 (2d Cir. 1998); *Avery v. United States*, 434 F. Supp. 937 (D. Conn. 1977); *Cruikshank v. United States*, 431 F. Supp. 1355 (D. Hawaii 1977); and *Orlikow v. United States*, 682 F. Supp. 77 (D.D.C. 1988)). None of these cases are comparable to protecting state secrets regarding a current foreign intelligence program designed to detect the activities of a terrorist network that presently seeks to attack the United States. In addition, *Barlow v. United States*, 53 Fed. Cl. 667, 684-88 (Fed. Cl. 2002) involved an investigation of whether relief due CIA "whistleblower" upon employment termination, and the matter could proceed without need for underlying classified information on Pakistan nuclear weapons program which employee analyzed.

Likewise, Plaintiffs' assertion that "numerous courts" have adjudicated questions concerning foreign intelligence surveillance without confronting any state secrets problem," *see* Pls. Opp. at 30 n. 33, is superficial at best. The cases on which Plaintiffs rely for this proposition concerned challenges to statutory provisions, not to the actual surveillance of the plaintiffs themselves. *See United States v. Duggan*, 743 F.3d 59, 69-76 (2d Cir. 1984) (court reviewed language of FISA to determine constitutionality of that act); *United States v. Pelton*, 835 F.2d 1067, 1074-75 (4th Cir. 1987) (same). *Doe v. Ashcroft*, 334 F. Supp. 2d 471 (S.D.N.Y 2004) and *Doe v. Gonzales*, 386 F.Supp. 2d 66 (D. Conn. 2005), both concerned challenges to the constitutionality of statutory provisions governing the production of information pursuant to National Security Letters issued by the Federal Bureau of Investigation. *See also Doe v. Gonzales*, 449 F.3d 415 (2d Cir. 2006). No state secrets assertions were at issue in these cases; indeed, in one case, the Government agreed to release the identity of a recipient of a National Security Letter. *See id.* at 420.

A. FISA Section 1806 is Inapplicable To This Case

The procedures set forth in Section 1806(f) generally apply where the Government intends to use the fruits of FISA surveillance "against" an "aggrieved person." *See* 50 U.S.C. § 1806(c), (e) & (f). The statute itself, and caselaw construing this section, make clear, however, that an "aggrieved person" is someone as to whom FISA surveillance has been made known, typically in a criminal proceeding. *See, e.g., United States v. Ott*, 827 F.2d 473, 474 (1987). By its very terms, Section 1806(f) applies in three contexts: first, when a governmental entity gives notice under Section 1806(c) or (d) that it intends to use evidence obtained or derived from FISA surveillance against the aggrieved person; second, when the aggrieved person seeks to suppress that evidence under Section 1806(e); and third, when the aggrieved person moves or requests "to discover or obtain FISA applications, orders or other materials" related to the surveillance or information derived from the surveillance. *See* 50 U.S.C. § 1806(f); *cf. id.* § 1804(a) (FISA applications); *id.* § 1805 (orders); *id.* § 1804(c), (d) (discussing other materials related to surveillance).

Section 1806(f) thus is an affirmative grant of authority that requires the district court to conduct an *in camera, ex parte* review at the request of the Attorney General, and such review occurs in those limited circumstances in which Section 1806(f) applies. *See, e.g., United States v. Hammoud*, 381 F.3d 316, 331-32 (4th Cir. 2004), *reaffirmed*, 405 F.3d 1034 (4th Cir. 2005) (criminal defendant moved to suppress recorded telephone conversions that were obtained through a FISA wiretap under section 1806(f); court, after an *in camera, ex parte* review, denied the motion to suppress); *United States v. Squillacote*, 221 F.3d 542, 552, 553-54 (4th Cir. 2000), *cert. denied*, 532 U.S. 971 (2001) (criminal defendant sought to suppress the fruits of the FISA surveillance; court reviewed FISA material *in camera* and *ex parte* and denied defendant's request); *United States v. Johnson*, 952 F.2d 565, 571-73 (1st Cir.) (upholding legality of FISA surveillance used against defendants at trial), *cert. denied*, 506 U.S. 816 (1992). This provision does not establish a means to discover whether surveillance has occurred in the first place. *See ACLU Foundation v. Barr*, 952 F.2d 457, 468-69 & n.13 (D.C. Cir. 1991) ("The government makes this point, with which we agree, that under FISA it has no duty to reveal ongoing foreign intelligence surveillance.") (citing S. Rep. 95-604, Pt. 1, 95th Cong., 1st Sess., at 59 (1977), reprinted in 1978 U.S.C.C.A.N. 3904, 3960-61); *In re Grand Jury Investigation*, 431 F. Supp. 2d 584, 591-92 (E.D. Va. 2006) (finding that, in grand jury proceedings, neither the non-target witness nor the potential target was entitled to notice under the FISA of whether there was any warrantless NSA electronic surveillance of the potential target).

B. FISA Section 1806 Does Not Preempt the State Secrets Privilege

1. The State Secrets Privilege Reflects the President's Constitutional Authority over National Security and Foreign Affairs and, thus, is Constitutionally Based

Plaintiffs' contention that FISA preempts the assertion of the state secrets privilege in this case is also baseless. This argument presumes, first, that the privilege is a mere "evidentiary" privilege. See Pls. Opp. at 17. That is clearly wrong. Plaintiffs fail to recognize that this privilege is firmly rooted in constitutional considerations. *See, e.g., United States v.*

Hubbell, 530 U.S. 27, 51-53 (2000) (Thomas, J., concurring).

The Supreme Court has made clear that the "authority to protect [national security] information falls on the President as head of the Executive Branch and as Commander in Chief" of the Nation's Armed Forces. *See Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988). Indeed, the Court has specifically emphasized that the Executive's authority to "control access to information bearing on national security" "exists quite apart from any explicit congressional grant" of power, because it flows primarily from the "constitutional investment of power in the President" found in Article II of the Constitution. Id.; *see also* U.S. Const., Art. II, § 1 ("The executive power shall be vested in [the] President"); *id.* § 2 ("The President shall be Commander in Chief of the Army and Navy of the United States").

The authority to invoke the state secrets privilege to protect national security information from disclosure in judicial proceedings is merely one aspect of the Executive's broader Article II power to control the dissemination of such highly sensitive information. The Supreme Court in *United States v. Nixon* contrasted the general privilege for Presidential communications, which is "inextricably rooted in the separation of powers," *see* 418 U.S. at 708, with the Executive's more focused constitutional privilege "to protect military, diplomatic, or national security secrets," *id*. at 710, and concluded that the general Executive privilege does not enjoy the same legal standing as the state secrets privilege. *See id.* at 706, 708, 710-11 (explaining that the Supreme Court had never "extended th[e] high degree of deference" applicable to the state secrets privilege "to a President's generalized interest in confidentiality" of his communications). In fact, it is precisely because the privilege for "military or diplomatic secrets" is grounded in "areas of Art. II duties," which the Executive alone can exercise, that "courts have traditionally shown the utmost deference" to the Executive's discharge of these "Presidential responsibilities" regarding state secrets. *Id.* at 710; *see also id*. at 710-11(discussing *Reynolds* as illustrative example).[10] The constitutional foundation for the state secrets privilege is reflected in its place at the apogee "of the various privileges recognized in our courts." *Halkin I*, 598 F.2d at 7; *see also, e.g., El-Masri*, 2006 WL 1391390, at *3-7 ("Given the vitally important purposes it serves, it is clear that while the state secrets privilege is commonly referred to as 'evidentiary' in nature, it is in fact a privilege of the highest dignity and significance."). There is no doubt that the state secrets privilege is rooted in Article II and the separation of powers embodied in the Constitution.

2. Nothing in FISA Indicates Clear Congressional Intent to Preempt the Constitutionally-Based State Secrets Privilege

Beyond its clear constitutional status, nothing in FISA demonstrates a clear intention on the part of Congress to abrogate the state secrets privilege. It is well-established that when Congress seeks to restrict or regulate the constitutionally-based powers of the Executive through legislation, it must make that intention clear. *See Swan v. Clinton*, 100 F.3d 973, 981 (D.C. Cir. 1996) (recognizing that there must be "affirmative evidence" that Congress intended to restrict Executive power); *Armstrong v. Bush*, 924 F.2d 282, 289 (D.C. Cir. 1991) (Congress must make a "clear statement" in order to "restrict[] or regulat[e] presidential action," because "[l]egislation regulating presidential action . . . raises 'serious' practical, political, and constitutional questions”) (citing *United States v. Bass*, 404 U.S. 336, 350 (1971)); *see also Public Citizen v. Dep’t of Justice*, 491 U.S. 440, 466 (1989) (“[W]e are loath to conclude that Congress intended to press ahead into dangerous constitutional thickets in the absence of firm evidence that it courted those perils.”). As the Supreme Court has noted, “[i]n traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.” *Bass*, 404 U.S. at 350.

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[10] That deference reflects the constitutional foundation for the state secrets privilege and the practical realities of national security decisions under a constitutional regime of separated powers. Because of the Executive Branch's particular sphere of constitutional responsibility, it alone has "the necessary expertise in protecting classified information" both to make the "[p]redictive judgment[s]" underlying a decision to invoke the state secret privilege and to determine "what constitutes an acceptable margin of error in assessing the potential risk." *Egan*, 484 U.S. at 529.

Moreover, even if the state secrets privilege were an ordinary common law privilege, courts have repeatedly held that statutes will not be read to overcome the common law without a clear congressional expression of an intent to do so. As the Supreme Court has instructed, “[i]t is a well-established principle of statutory construction that ‘[t]he common law . . . ought not to be deemed repealed, unless the language of a statute be clear and explicit for this purpose.’” *Norfolk Redevelopment and Housing Authority v. Chesapeake and Potomac Telephone Co. of Norfolk*, 464 U.S. 30, 35-36 (1983) (citation omitted); *see also United States v. Texas*, 507 U.S. 529, 533 (1993) (“In order to abrogate a common-law principle, the statute must ‘speak directly’ to the question addressed by the common law.”) (internal citations omitted).

Nowhere in Section 1806(f) is there any indication, let alone a clear statement, that Congress had intended to restrict the applicability of the state secrets privilege in cases like this. Indeed, the text of FISA contains no mention of the state secrets privilege, and we are aware of no discussion, or even mention, of the state secrets privilege in the legislative history of FISA—let alone an affirmative statement by Congress that it intended to restrict the Executive’s authority to assert the privilege to protect foreign intelligence surveillance activities. *See, e.g.*, H.R. Report No. 95-1273 (1978); H.R. Conf. Rep 95-1720 (1978); S. Rep. No. 95-701 (1978); S. Rep. No. 95-604 (1977).[11]

Finally, Plaintiffs' reliance on *Halpern v. United States*, 258 F.2d 36 (2d Cir. 1958), for the proposition that a statute may waive the state secrets privilege, *see* Pls. Opp. at 29-30; 47, 49, is entirely without merit, as subsequent cases interpreting *Halpern* in the Second Circuit make clear. *Halpern* involved the narrow question of whether the Invention Secrecy Act, 35 U.S.C. § 183 *et seq*., allowed a patent challenge to proceed notwithstanding the need to protect state secrets as to the use made by the government of a cryptographic encoding device. As subsequent authority reveals, the circumstances at issue in *Halpern* were exceedingly narrow and did not recognize a waiver of the state secrets privilege under that Act. In *Clift v. United States*, 597 F.2d 826, 829 (2d Cir. 1979), the Second Circuit revisited *Halpern* and distinguished that case in finding that the state secrets privilege was not waived by the Inventions Secrecy Act. The court in *Clift* found that, while the plaintiff in *Halpern* "knew his own invention . . . he did not know how extensively it was used, and these facts were state secrets." *See id*.; *see also Halpern*, 258 F.2d at 44 (plaintiff in *Halpern* did not "seek[] to obtain information he did not possess"). Thus any *in camera* proceedings in *Halpern* did not involve an exposition of the *Government's* state

[11] Any attempt to interpret FISA to preclude the Executive's ability to assert the state secrets privilege over matters possibly covered by FISA should be avoided, since doing so would raise extremely serious constitutional issues. *See Public Citizen*, 491 U.S. at 466 ("It has long been an axiom of statutory interpretation that 'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress'") (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988))*; Nadarajah v. Gonzales*, 443 F.3d 1069, 1076 (9th Cir. 2006) ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' we are obligated to construe the statute to avoid such problems.") (quoting *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001)).

secrets but rather concerned sensitive information that the plaintiff already knew because he invented the device at issue.

In *Clift*, where the state secrets privilege was again asserted by the Government in a similar factual setting, the Second Circuit declined to follow *Halpern*. Indeed, the Court specifically rejected the notion of *in camera* discovery because the plaintiff did not have a security clearance and, thus, could not obtain the results of any discovery. *See Clift*, 597 F.2d at 829. Instead, the Second Circuit simply deferred the case to see if future developments as to cryptographic devices might make it possible for the Government to produce some information under safeguards. *See id; see also American Tel. & Tel. Co. v. United States*, 4 Cl. Ct. 157, 160 (1983) (relying on *Clift* and rejecting assertion that the Invention Secrecy Act is a waiver of the state secrets privilege).

A decade later, the information at issue in *Clift* was still subject to the state secrets privilege and, on remand, the district court upheld the state secrets assertion and dismissed the case. *See Clift v. United States*, 808 F. Supp. 101, 109-111 (D. Conn. 1991). The district court specifically found that, based on the Second Circuit's subsequent reading of *Halpern*, the Invention Secrecy Act should not be interpreted to waive the state secrets privilege, because that would "turn an absolute privilege into a qualified one, which is unsupported by precedent or statute." *Id.* at 110. The district court then held that, in cases where the plaintiffs did attempt to obtain access to government states secrets to which they were not entitled, the "sweeping waiver language of *Halpern*" did not apply. *Id.* Thus, *Halpern* is no authority at all for the proposition that a statutory provision in general, or FISA in particular, waives an assertion of the state secrets privilege.

IV. THE EVIDENCE NEEDED TO ADDRESS PLAINTIFFS' CLAIMS IS SUBJECT TO THE STATE SECRETS PRIVILEGE

Assuming Plaintiffs could establish their standing and the merits of their claims could thus be reached, Plaintiffs assert that Defendants have "no valid legal defense" that requires the disclosure of state secrets, either as to claims challenging whether the President has statutory or constitutional authority to establish the TSP, or whether the program complies with the Fourth or First Amendments. *See* Pls. Opp. at 31; 34-44.[12] Plaintiffs argue that their claims present "purely legal issues" that can be resolved on the basis of facts already disclosed. *See id.* at 31. As set forth below, that proposition is untenable.

A. Plaintiffs' Challenge to the President's Authority to Establish the TSP Raises Significant Fact Issues and State Secrets Are Necessary to Resolve This Claim

Plaintiffs first contend that the President has no statutory authority under FISA, nor any inherent constitutional authority, to authorize the TSP, and that no facts are needed to resolve these claims. *See* Pls. Opp. at 34-39. But, on the contrary, neither challenge to the President's authority can proceed without a detailed and complete understanding of the actions taken by the President and the reasons for them, and such an understanding requires information protected by the state secrets privilege.

1. Assessing the President's Inherent Authority to Undertake Foreign Intelligence Surveillance Would Require the Disclosure of State Secrets

The beginning and end of Plaintiffs' analysis that the FISA covers every possible circumstance in which the President wishes to direct foreign intelligence surveillance. Plaintiffs argue that the President has no authority to proceed otherwise "no matter what his motivations may be, and no matter what kind of threat or emergency is posed." *See* Pls. Opp. at 37. This absolutist position does not even allow for the possibility that the President and Congress share constitutional authority in this area and thus rejects the need to examine where authority may lie in a given situation.

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[12] Defendants addressed Plaintiffs' First Amendment claims in their opening brief, *see* Defs. Mem. at 44-46, and no additional reply points are necessary as to this claim.

The extent of Congress's authority in this area is far from a settled proposition. Indeed, courts have specifically recognized the inherent constitutional authority of the *President* to conduct foreign intelligence surveillance. *See* Defs. Mem. at 33-34. Plaintiffs' observation that the Supreme Court in *United States v. United States District Court,* 407 U.S. 297 (1972) (the "*Keith*" case), did not delve into the details of how surveillance was conducted before holding that a warrant was required, *see* Pls. Opp. at 38, is quite beside the point. The Supreme Court in *Keith* expressly reserved the issue as to the President's authority over foreign intelligence surveillance. *Id.* at 321-22.

Following *Keith,* courts acknowledged the President's constitutional role in this area. In *United States v. Brown,* 484 F.2d 418, 426 (5th Cir. 1973), *cert. denied*, 415 U.S. 960 (1974), the court distinguished the teaching of *Keith* that "in the area of domestic security, the President may not authorize electronic surveillance without some form of prior judicial approval," from the President's inherent constitutional power to protect national security in the context of foreign affairs. *See id.* at 426. The court stated:

> Because of the President's constitutional duty to act for the United States in the field of foreign relations, and his inherent power to protect national security in the context of foreign affairs, we reaffirm . . . that the President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence.

Id. In addition, in *Zweibon v. Mitchell*, 516 F.2d 594 (D.C. Cir. 1975) (en banc), *cert. denied,* 425 U.S. 944 (1976), in which a plurality suggested that the warrant requirement would apply even as to foreign intelligence gathering, the court specifically noted that the target at issue in that particular case was a *domestic* organization and stated that their conclusion that the President's powers might be different if a foreign power was targeted. *See* 516 F.2d at 651 ("[W]e are only presented with a case in which foreign threats of retaliation against individual citizens abroad were provoked by the actions of the domestic organization which was subsequently wiretapped, rather than a case in which the wiretapped organization acted in collaboration with, or as the agent of, the foreign power from which the threat emanated.")

The Fourth Circuit also observed in *United States v. Truong Dinh Hung*, 629 F.2d 908 (4th Cir. 1980), that "the needs of the executive are so compelling in the area of foreign intelligence, unlike the area of domestic security, that a uniform warrant requirement would, following *Keith*, "unduly frustrate" the President in carrying out his foreign affairs responsibilities." *Id.* at 913. And, lastly, the Foreign Intelligence Surveillance Court of Review stated in 2002 that it "took for granted" that the President did have inherent authority to conduct warrantless searches to obtain foreign intelligence information. *See In re Sealed Case*, 310 F.3d 717, 742 (Foreign Intel. Surv. Ct. of Rev. 2002).

Plaintiffs grapple with none of this authority; their position is simply that FISA trumps it all, "no matter what kind of emergency is posed." *See* Pls. Opp. at 37. They simply assume that Congressional power in this area is paramount, wholly without regard to core Presidential powers that the courts have long-recognized. *See* Defs. Mem. at 31-32. To briefly reiterate, the President's most basic duty under the Constitution is to protect the Nation from attack, *see, e.g., The Prize Cases*, 67 U.S. 635 (1862), and seeking to detect the presence and activities of a foreign enemy in the United States is well within the President's authority. *See* Defs. Mem. at 26-27 (citing *Chicago & Southern Air Lines*, 333 U.S. at 111; *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)).

Defendants do not, as Plaintiffs argue, contend that the President's authority is plenary and trumps Congressional power in every respect. *See* Pls. Opp. at 39. But Plaintiffs' theory that the President, in seeking to detect a foreign attack on this Nation, must always follow Congressional requirements, is not supported as a matter of constitutional law. The true issue of law present here is not whether the President has authority to undertake foreign intelligence surveillance, given his core Article II responsibilities, but when that authority may be applied. And any assessment of whether the exercise of Presidential authority at issue in this case is lawful would require a detailed exposition of the activities authorized—including the specific nature of the intelligence information, sources, and methods underlying the TSP and, in particular, information demonstrating why the normal FISA process would not be sufficient and would therefore intrude on the President's responsibility to protect the Nation.[13]

Plaintiffs themselves put facts at issue, arguing that the success of FISA over the years is proof that FISA would be sufficient for the present national security crisis posed by al Qaeda. *See* Pls. Opp. at 38. Plaintiffs have no way of knowing whether that is so, however, in light of the particular exigency and enemy tactics at issue. This is the very information that cannot be disclosed, lest foreign adversaries such as al Qaeda become aware of the means by which the United States seeks to stop them. Plaintiffs' position ultimately leads to an untenable choice for the United States to either put forward state secrets needed to demonstrate that the President has acted within his authority in relation to the al Qaeda threat, or accept an adjudication based on facts that are entirely inadequate to demonstrate the vital national security interests at stake. *See Chicago & Southern Air Lines*, 333 U.S. at 111 ("It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."). This is precisely the scenario that the state secrets privilege is designed to protect.

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[13] Plaintiffs assertion that *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) involved "no consideration of specific actions by the President," *see* Pls. Opp. at 37, is clearly wrong. *Youngstown* involved the seizure of a domestic steel mill by the President, and that context significantly influenced the outcome there. At issue here is a foreign intelligence surveillance program targeted at a foreign terrorist enemy intent on attacking the United States. The application of Presidential power in these two contexts is markedly different.

2. Plaintiff's Statutory Claim Likewise Does Not Involve Purely Legal Questions but Implicates State Secrets

Plaintiffs seek to raise a distinct claim challenging surveillance under the TSP as without statutory authority in violation of the Administrative Procedures Act, 5 U.S.C. § 702,[14] because it allegedly violates Section 109 of FISA, 50 U.S.C. § 1809, which prohibits any person from intentionally engaging in electronic surveillance under color of law except as authorized by statute. *See* Pls. Opp. at 34-35; Compl. ¶ 46. Plaintiffs argue that this claim can be resolved on purely legal grounds because no statute, including the Authorization for the Use of Military Force enacted after the 9/11 attacks, *see* Pub. L. No. 107-40 § 21(a), 115 Stat. 224, 224 (Sept. 18, 2001) ("AUMF"), supercedes the requirements of FISA (and Title III of the U.S. Code) as the exclusive means for undertaking surveillance. *See* Pls. Opp. at 34. As set forth below,

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[14] The President's actions in authorizing the TSP would not be subject to this statutory claim because the President is not an agency subject to the APA and, thus, his actions cannot be reviewed under the APA. *Franklin v. Massachusetts*, 505 U.S. 788 (1992).

Plaintiffs' contention that the AUMF does not support the actions taken by the President to authorize the TSP is wrong, along with the notion that this claim implicates solely questions of law.

Plaintiffs contend that the AUMF cannot supply a statutory exception to FISA because "warrantless wiretapping of Americans at home" cannot be within the ambit of any implied war power authorized by the AUMF. *See* Pls. Opp. at 12 (discussing *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (holding that detention of enemy combatant is an accepted incident of war within the AUMF). This contention presents both factual and legal issues. On its face, the AUMF addresses the President's authority on precisely the same subject as the TSP. Congress not only authorized the President "to use all necessary and appropriate force" against those responsible for the 9/11 attacks, but also acknowledged that "the President has authority under the Constitution to take action *to deter and prevent* acts of international terrorism against the United States." *See* AUMF, pmbl. Even more so than the detention of enemy combatants upheld in *Hamdi* as consistent with the AUMF, foreign intelligence surveillance to deter and prevent terrorist attacks is squarely within the terms of the AUMF as a necessary incident of war. *See* Defs. Mem. at 32-33 & n.19.

Nonetheless, Plaintiffs contention that the TSP, as implemented, is not sufficiently related to waging war against al Qaeda, puts at issue the scope and nature of that program. As with Plaintiffs' constitutional claim, to fairly assess Plaintiffs' contention would require a full understanding of precisely how the TSP focuses on the al Qaeda threat, and in particular the need maximum speed and flexibility in doing so, and information related to these issues is subject to the state secrets privilege assertion. Any conclusion that the TSP is *not* a necessary incident to the war against, and thus not fairly within the scope of the AUMF, would be unreasonable and unfounded in the absence the facts that must remain privileged.

Resolution of this statutory issue would not resolve the case in any event because the President's authorization of the TSP is well within his inherent constitutional power, as discussed above. Indeed, construing the AUMF to support the President's actions would avoid the serious constitutional question presented by Plaintiffs' statutory claim, namely that an application of FISA to bar the TSP would pose a direct interference with the President's constitutionally assigned duties. Resolution of either claim requires an full and detailed understanding of the TSP and the threat it seeks to address.[15]

B. Plaintiffs' Fourth Amendment Claim Raises Significant Fact Issues and State Secrets Are Necessary to Resolve This Claim

Plaintiffs take the same absolutist position in arguing that their Fourth Amendment claim requires no facts to resolve. They lecture Defendants for allegedly ignoring "basic Fourth Amendment doctrine," *see* Pls. Opp. at 40, and then proceed to rely primarily on two cases in support of their position that a warrant is required *per se* for electronic surveillance. Both cases, however, expressly declined to apply a *per se* warrant requirement to the surveillance of a foreign threat to national security. In *Katz v. United States,* 389 U.S. 347 (1967), the Court concluded its decision on the need to seek a warrant for electronic surveillance with this caveat: "Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case." *Id*. at 358 n.23. Likewise, in *Keith*, the Court stated that "the instant case requires no judgment on the scope of the President's surveillance power with respect to the activities of foreign powers, within or without this country." 407 U.S. at 308. In deciding the question left open by *Katz* as to whether a warrant is required for wiretaps that concerned national security, *see id.* at 309, the Court in *Keith* did not reach the issue presented by this case. Despite this, Plaintiffs assert that *Defendants* have ignored applicable authority in citing to several appellate decisions directly on point which, following *Keith*, upheld warrantless foreign intelligence surveillance.

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[15] Finally, Plaintiffs' reliance on the recent Supreme Court decision in *Hamdan v. Rumsfeld*, __ U.S. __, 2006 WL 1764793 (June 29, 2006), is misplaced. *Hamdan* concerned whether the procedures established by the Executive branch for military commissions were consistent with statutory law in an area where Congress has clear textual powers to regulate. *See, e.g.*, *Hamdan*, 2006 WL 1764793, at *20 (citing U.S. Const., *Art*. I, sec. 8, cl. 11 granting Congress the power to "make rules concerning captures on land and water"). The resolution of that statutory question would not resolve the underlying issue here as to whether the FISA, as applied to the TSP, intrudes on the *President's* Article II duties to protect the nation. Also, and as noted, the AUMF speaks more clearly to the subject at issue here than in *Hamdan*, as the TSP is a direct and specific method of deterring and preventing acts of terrorism.

In *United States v. Brown*, the court reaffirmed that the President may constitutionally authorize warrantless wiretaps for the purpose of gathering foreign intelligence. *See* 484 F.2d at 426. In *United States v. Butenko,* the Court agreed, stating that "[c]ertainly occasions arise when officers, acting under the President's authority, are seeking foreign intelligence information, where exigent circumstances would excuse a warrant." 494 F.2d at 605. In *United States v. Truong Dinh Hung*, the Fourth Circuit found that "attempts to counter foreign threats to the national security require the utmost stealth, speed, and secrecy[,]" and, thus, that a "warrant requirement would add a procedural hurdle that would reduce the flexibility of executive foreign intelligence initiatives, in some cases delay executive response to foreign intelligence threats, and increase the chance of leaks regarding sensitive executive operations." 629 F.2d at 913.

The FISA did not simply negate prior authority as to the President's constitutional authority, even if that was the objective of Congress. This case presents the question not joined since the enactment of FISA and prior authority recognizing the President's power in this area: can a Congressional enactment trump the President's power to undertake surveillance of a foreign enemy to prevent a foreign attack on U.S. soil? As stated throughout, Defendants submit the answer to that question clearly depends on the facts and circumstances concerning how the foreign intelligence surveillance program at issue operates. Indeed, as the D.C. Circuit specifically held in *Halkin II*, the notion of deciding these questions on a record devoid of details that might even identify the targets of such surveillance is "ludicrous" and calls for the issuance of an advisory opinion. 690 F.2d 1003 n.96.

Plaintiffs' assertion that the court in *Ellsberg v. Mitchell* "rejected the government's argument that state secrets necessarily prevented the government from arguing there was a foreign exception to the warrant requirement," *see* Pls. Opp. at 41, once again wrenches out of context what the court held. With respect to those plaintiffs whom the government in *Ellsberg* had not admitted overhearing, the court found that they lack an essential element of their proof of standing and that dismissal of their claims was therefore proper. *See* 709 F.2d at 65.

Only where surveillance was confirmed did the divided panel remand the case for further consideration of the Fourth Amendment issue in a highly narrow context. As to those plaintiffs, the particular claims at issue were *Bivens* claims alleging that individual officers of the government violated the plaintiffs' Fourth Amendment rights. The court believed a remand was possible because all that needed to occur was the submission of a classified declaration describing what these officers did to demonstrate whether they had qualified immunity. *See id.* at 69. The court noted that, where the ascertainment of qualified immunity is at issue, "[s]ome factual judgments will still be required, but they will be more circumscribed and manageable" and "[o]nce an official's conduct has been ascertained, the determinative question will be what rules were 'clearly established' at the time he acted." *Id*. Through the use of an *in camera* submission, "[t]he judge would thus need only to determine whether clearly established doctrine proscribed such conduct at the time it was undertaken" and "such a determination would seem to be possible without the aid of arguments of counsel." *Id*. (emphasis added).

Accordingly, the *Ellsberg* remand was highly limited in scope. The Court contemplated little more than that the district court would refer to the Government's classified submission to assess the single, dispositive legal issue of qualified immunity. *Ellsberg* does not stand for the proposition that the merits of constitutional claims can be decided through *in camera* procedures even after the assertion of the state secrets privilege. To the extent it may be read so broadly, then *Ellsberg* is not consistent with state secrets authority which makes clear that, where classified information is necessary to resolve a case, the case must be dismissed. *See Halkin I, Halkin II, Molerio, El-Masri, Edmond*s *supra* (dismissing constitutional claims on state secrets grounds); *see also Ellsberg*, 709 F.2d at 70 (MacKinnon, C.J. concurring in part and dissenting in part) ("[B]ecause the claims of state secrets privilege have been sustained, I can envision no scenario whatsoever in which the district court could resolve on the public record the factual question whether these taps fall within the foreign agent exception.").[16]

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[16] Plaintiffs' suggestion that *Jabara* permitted the Fourth Amendment claim to proceed despite a state secrets claim, *see* Pls. Opp. at 41, is wholly misleading. That claim had nothing to do with an initial state secrets assertion by NSA as to the fact of interception, and ultimately the Fourth Amendment was dismissed in part because the court presumed the NSA surveillance was lawful. *See Jabara v. Webster*, 691 F.2d at 277-79.

V. ALTERNATIVES TO DISMISSAL THAT PLAINTIFFS SUGGEST ARE UNSUPPORTED IN LAW AND WOULD BE UNWORKABLE HERE

Plaintiffs urge the Court to consider various procedural alternatives to dismissal. *See* Pls. Opp. at 44-50. Defendants agree that the Court may "carefully scrutinize" the Government's claim of privilege, *id.* at 44, and note that we have already set forth for the Court the particular evidence that is privileged, the relevance of that evidence to a valid defense, and the reason disclosure of the information at issue would harm national security. Beyond this, however, the procedural mechanisms suggested by Plaintiffs are not available in a case such as this.

First, the law is clear that Plaintiffs' counsel are not to be granted security clearances authorizing their access to classified information under protective orders, particularly where the states secrets privilege has been asserted. *See* Pls. Opp. at 48 n.44. The rationale for this rule is that "our nation's security is too important to be entrusted to the good faith and circumspection of a litigant's lawyer . . . or to the coercive power of a protective order." *Ellsberg*, 709 F.2d at 61 (rule denying private counsel access to classified information is "well settled"); *see also Halkin I*, 598 F.2d at 7 ("It is not to slight judges, lawyers, or anyone else to suggest that any such disclosure carries with it the serious risk that highly sensitive information may be compromised") (quoting *Knopf, Inc. v. Colby*, 509 F.2d 1362 (4th Cir. 1975)); *Weberman v. NSA*, 668 F.2d 676, 678 (2d Cir. 1982) (risk presented by giving private counsel access to classified information outweighs benefit of adversarial proceedings); *Jabara*, 75 F.R.D. at 486 ("plaintiff and his legal representative should be denied access to classified in camera exhibits submitted in support of the (privilege) claims"). Indeed, the Supreme Court in *Reynolds* indicated that the court itself "should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers."

345 U.S. at 10.[17]

Beyond this, Plaintiffs propose other procedures to facilitate their access to sensitive information concerning the case, such as seals and protective orders. *See* Pls. Opp. at 35-36. As one court aptly observed, however,

> Such procedures, whatever they might be, still entail considerable risk. Inadvertent disclosure during the course of a trial—or even *in camera*—is precisely the sort of risk that *Reynolds* attempts to avoid. At best, special accommodations give rise to added opportunity for leaked information. At worst, that information would become public, placing covert agents and intelligence sources alike at grave personal risk.

Sterling v. Tenet, 416 F.3d at 348; *see also Halkin I*, 598 F.2d at 7 (protective orders "cannot prevent inadvertent disclosure nor reduce the damage to the security of the nation which may result."). Moreover, such measures would effectively convert the state secrets privilege from an absolute protection of state secrets regardless of a litigant's need, to a qualified one where some information is shared based on need. This is not the law.[18]

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[17] Plaintiffs also point to a number of criminal cases involving the Classified Information Procedures Act, 18 U.S.C. § app. 3 § 1 et seq. ("CIPA"). *See* Pls. Opp. at 47 n. 43. CIPA applies solely in criminal cases, where the very liberty or life of a criminal defendants is at stake, and classified information may be relevant to that determination. Even CIPA does not require the Government to declassify anything, although it might have to decline prosecution as a result. On the civil side, the presumption is reversed: if classified information is needed to resolve the case, the plaintiff's interest must give way to the national security interest.

[18] Similarly, any effort to "work around" classified facts through summaries, *see* Pls. Op. at 48, would either be suggestive of what the underlying facts are–and thus risk disclosure, *see* Halkin *I*, 598 F.2d at 8 (even bits and pieces of seemingly innocuous facts can be analyzed and fitted into place to reveal "how the unseen whole must operate.") or, be so general as to lead to a decision based on facts that are materially inaccurate or incomplete, in effect an advisory opinion. *Halkin II*, 690 F.2d at 1001; *see also Molerio*, 749 F.2d at 825 (it would be a "mockery of justice" to allow a case to proceed to the merits based on erroneous assumptions as to the actual facts protected by the state secrets privilege).

As a last resort, Plaintiffs contend that the Court should engage in a merits determination based on classified evidence, *in camera*, and *ex parte*. *See* Pls. Opp. at 47 n.43, 49. In this discussion, Plaintiffs again mispresent *Molerio, Ellsberg,* and *Halpern* as involving *ex parte* review of state secrets for merits determinations. This is not the established procedure for resolving state secrets claims. Rather, the law is clear that, where classified information is necessary to resolve a case, dismissal, not a secret merits determination, is required. *See Zuckerbraun*, 935 F.3d at 547.

No procedural mechanism can address the central concern with this case: it directly puts at issue a classified foreign intelligence program and adjudication of the claims, including Plaintiffs' standing, inherently requires state secrets about that program. Innovative procedural mechanisms that safely work around state secrets apply solely in cases where that information is not central to the resolution of the case. As significant a matter as the case presents, establishing the lawfulness of the alleged activities would require disclosing vital intelligence information, sources, and methods, or addressing the case in a complete vacuum. Neither is an acceptable alternative, and there is no avoiding the need for dismissal here.

VI. THE STATUTORY PRIVILEGES INVOKED IN THIS CASE FURTHER PROTECT THE STATE SECRETS AT ISSUE.

Plaintiffs' effort to diminish the statutory privileges invoked by the Director of National Intelligence and the Director of the National Security Agency to protect intelligence sources and methods is also unavailing. That the statutory privileges typically arise in Freedom of Information Act (FOIA) cases, *see* Pls. Opp. at 50, takes nothing away from the fact that the privileges were properly asserted—and properly apply to the information at issue—in this case. Indeed, Congress spoke clearly, broadly, and sensibly in protecting from disclosure information pertaining to the intelligence activities of the NSA, and Plaintiffs have pointed to no valid basis for contravening Congress's plain intent.

Despite the clear language in Section 6 of the National Security Agency Act of 1959 that nothing in that Act "*or any other law*" shall be construed to require the disclosure "of *any* information with respect to the activities" of the NSA, 50 U.S.C. § 402 note (emphasis added), Plaintiffs argue that the statute was designed merely to "eliminate an operational conflict" by protecting the NSA from "providing personnel data to the Civil Service Commission," Pls. Opp. at 50. That argument is easily rejected. Although relieving the NSA of statutory requirements pertaining to the Civil Service Commission was certainly one of the effects of the statute, Section 6 plainly reaches beyond the disclosure of personnel data. In fact, it explicitly provides that it is *not* limited to Civil Service Commission obligations (obligations which have been repealed in any event). *See* 50 U.S.C. § 402 note § 6(a) ("[N]othing in this Act or any other law (*including, but not limited to, the first section and section 2 of the Act of August 28, 1935 (5 U.S.C. 654))*[19], shall be construed to require the disclosure . . . of any information with respect to the activities [of the NSA].") (emphasis added). The language of Section 6 thus directly contradicts Plaintiffs' overly narrow view of the statute. Moreover, as Plaintiffs acknowledge, Section 6 has been successfully invoked to protect non-personnel information about NSA intelligence activities from disclosure under FOIA and pursuant to subpoena. *See Linder v. NSA*, 94 F.3d 693, 698 (D.C. Cir. 1996); *Hayden v. NSA*, 608 F.2d 1381, 1389-91 (D.C. Cir. 1979).

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[19] The Act of August 28, 1935 referred to in Section 6 is Public Law No. 74-387, 49 Stat. 956, which required federal agencies to supply certain personnel information to the United States Civil Service Commission each year for publication in the Official Register of the United States. The 1935 Act was repealed in 1960. *See* Pub. L. No. 86-626, Title I, § 101, 74 Stat. 427 (July 12, 1960).

There is no reasoned basis to distinguish the protection of sensitive NSA intelligence-related information in those contexts from protection in a case such as this, where the disclosure of such information would be necessary for a fair and complete adjudication of Plaintiffs' claims.[20]

Plaintiffs fault Defendants and the D.C. Circuit in *Linder* for failing to cite the opening clause of Section 6(a), which states that the statutory privilege applies "[e]xcept as provided in subsection (b) of this section." *See* Pls. Opp. at 51 n.47. Plaintiffs argue that subsection (b) "makes certain NSA employees subject to the Civil Service Commission reporting act," and that the opening clause of Section 6(a) thus "clearly indicates . . . that the exemption created by Section 6 is far less than absolute." *Id.* Plaintiffs' argument, however, is based on a clear misreading of the statute.[21] Subsection (b) has nothing to do with the Civil Service Commission (as noted above, the statute referred to in Section 6(a) is the relevant Civil Service Commission provision). Rather, subsection (b) refers to 10 U.S.C. § 1582, which currently authorizes the Secretary of Defense to provide assistive technology to federal employees with disabilities and thus is unrelated to Section 6. Previously, section 1582 directed the Secretary of Defense to report annually to Congress on certain civilian research and development personnel employed by the Department of Defense, and in that respect was relevant (as an explicit exception) to Section

[20] Similarly, the three cases Plaintiffs cite regarding the DNI statutory privilege, 50 U.S.C. § 403-1(i)(1), simply uphold the application of the privilege in other contexts and thus provide no support for the preclusion of the privilege in this case. *See CIA v. Sims*, 471 U.S. 159, 168-69 (1985); *Snepp v. U.S.*, 444 U.S. 507, 510 n.3 (1980); *Fitzgibbon v. CIA*, 911 F.2d 755, 763 (D.C. Cir. 1990).

[21] Plaintiffs' argument also makes no sense. On the one hand, Plaintiffs claim that the NSA statutory privilege was designed simply to exempt the NSA from disclosing information to the Civil Service Commission, *see* Pls. Opp. at 50, and on the other, Plaintiffs argue that subsection (b) of the statute makes NSA employees *subject* to Civil Service Commission reporting, *id.* at 51 n.47.

6 of the National Security Act. *See* Pub. L. No. 86-377, § 3, 73 Stat. 701 (Sept. 23, 1959), repealed by Pub. L. No. 97-295, § 1(19)(A), 96 Stat. 1290 (Oct. 12, 1982). But the fact that Congress provided *one* specific exception to the non-disclosure provision of Section 6 only underscores the breadth of that provision.[22]

Plaintiffs' final argument on the statutory privileges is that they would likely be unconstitutional if they were construed to deny a judicial forum for Plaintiffs' constitutional claims. *See* Pls. Opp. at 51. Plaintiffs cite no authority for the proposition that a statutory privilege, or any other privilege for that matter, may be abrogated simply because the information protected is relevant to a constitutional claim. Plaintiffs' cursory argument on this point, therefore, must be rejected. In any event, the Court can easily avoid any constitutional concern about the scope of the statutory privileges in this case. As stated by both Director Negroponte and General Quirk, the statutory privilege assertions cover the same information protected by the state secrets privilege in this case. *See* Public Negroponte Decl. ¶ 10; Public Quirk Declaration ¶¶ 7-9. Because the state secrets privilege itself is grounded in the Constitution, *see United States v. Nixon*, 418 U.S. 683, 710 (1974), there can be no constitutional problem with precluding the litigation of Plaintiffs' claims on the ground that such adjudication would require the disclosure of privileged national security information.

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[22] Lest the Court have any concern about the breadth of Section 6, Plaintiffs' inability to point to any cases rejecting an application of the privilege as overbroad demonstrates that the NSA has used the statute sparingly and only when appropriate and necessary. Moreover, having provided the NSA broad authority to protect information about its intelligence activities, Congress could have amended or limited the provision if it thought that NSA was overreaching in utilizing the privilege. Instead, it has gone untouched for nearly 50 years, and Congress's judgment to allow the NSA the discretion to protect sensitive national security information must be given effect.

VII. DEFENDANTS' SUBMISSIONS ARE THE ONLY APPROPRIATE RESPONSE TO PLAINTIFFS' SUMMARY JUDGMENT MOTION.

Finally, on July 6, 2006, the Court denied Defendants' Motion to Stay Consideration of Plaintiffs' Motion for Partial Summary Judgment ("Defendants' Stay Motion") and allowed Defendants a further opportunity to submit papers addressing Plaintiffs' summary judgment motion (hereafter "Plaintiffs' Motion"). The Court indicated that "[i]ssues raised by defendants' assertion of the state secrets privilege are intertwined with legal questions raised by plaintiffs' motion, such as the scope of the President's powers under Article II of the U.S. Constitution," and that it would be "helpful to the Court's understanding of the issues raised by defendants' motion to dismiss (as well as efficient) for the merits of all pending motions to be heard simultaneously." Order at 1.

Although the legal questions raised by Plaintiffs' Motion are related to the issues presented by the state secrets assertion, Defendants respectfully submit that Plaintiffs' Motion cannot be adjudicated—and no further response from Defendants can be made—prior to a determination regarding the effect of the state secrets privilege on this case. Indeed, the very point of Defendants' Motion to Dismiss or for Summary Judgment is that facts material to the merits of Plaintiffs' claims, including facts that Defendants would need to present a defense to Plaintiffs' Motion, are privileged and unavailable in this case. Because Defendants are thus unable to respond to Plaintiffs' Motion without disclosing privileged and classified material facts, Defendants respectfully submit that their present submissions—which explain in detail why Plaintiffs' Motion cannot and should not be granted in light of the state secrets assertion—are the only appropriate response to Plaintiffs' Motion at this juncture.

* * *

From the outset of this case, Plaintiffs have clearly desired to force an adjudication of the merits of their claims as quickly as possible, including by moving for summary judgment before Defendants were even required to respond to the Complaint. Where the disclosure of highly classified intelligence information is at stake, however, eager litigants cannot short-circuit the appropriate and well-established process for protecting such information and for determining whether a case can proceed in the absence of such information. As courts have consistently recognized, the United States has an "absolute right" to protect information in the interest of national security, and that right must be respected. *E.g.*, *Halkin v. Helms*, 690 F.2d 977, 990 (D.C. Cir. 1982).

Accordingly, Director Negroponte's assertion of the state secrets privilege must, at the very least, be considered as a threshold issue before Defendants can be required to respond to the merits of any claim implicating privileged information.[23] Any other course would put the

[23] In similar circumstances, the district courts in *Hepting v. AT&T*, Civil Action No. 06-672 (N.D. Cal.), and *Terkel v. AT&T*, Civil Action No. 06-2837 (N.D. Ill.), declined to consider requests for preliminary injunctions against AT&T (for its alleged cooperation with the NSA) before considering the United States' assertion of the state secrets privilege. As already mentioned, the district court in *Terkel* granted the United States' motion to dismiss on state secrets grounds prior to considering the plaintiffs' requests for injunctive relief. Moreover, after the United States intervened to assert the privilege in *Hepting*, the court in that case cancelled a previously-scheduled preliminary injunction hearing and instead set a hearing on, *inter alia*, the threshold state secrets issues raised by the United States in its motion to dismiss (as previously noted, the court subsequently denied the United States' motion to dismiss in *Hepting* and certified that decision for an interlocutory appeal). Although the district court in *ACLU v. NSA*, Civil Action No. 06-10204 (E.D. Mich.), denied the United States' motion to stay a summary judgment motion brought by the plaintiffs, the United States subsequently explained that, like here, no further response to the merits of plaintiffs' claims could be made without disclosing state secrets and that the United States' detailed response in its state secrets motion was the only appropriate response at that juncture. *See ACLU*, Docket Item No. 45 (June 2, 2006). The court in *ACLU* has not yet ruled on any of the pending dispositive motions, nor has it indicated that it will rule on the plaintiffs' motion prior to ruling on the state secrets assertion.

ultimate merits of Plaintiffs' claims before critical, threshold jurisdictional and evidentiary issues. Indeed, because the defense of this action would require classified facts, that defense cannot be made "without forcing a disclosure of the very thing the privilege is designed to protect." *Reynolds*, 345 U.S. at 8; *accord Zuckerbraun v. General Dynamics Corp.*, 935 F.2d at 547. In order to prevent forcing that type of disclosure, courts have held that dismissal of an action (or, alternatively, summary judgment for the Government), rather than a presentation of a defense, is required if (1) state secrets are necessary for the plaintiff to prove its claims; (2) the state secrets privilege deprives the defendant of information necessary to defend against the claims; or (3) the "very subject matter of the action" is a state secret. *See, e.g.*, *Kasza*, 133 F.3d at 1166; *Zuckerbraun*, 935 F.2d at 547.

All three of these elements—including that Defendants cannot respond to Plaintiffs' Motion without classified and privileged facts—are satisfied here and, accordingly, this case cannot proceed. Defendants, moreover, did not merely make a general presentation on this issue. Rather, Defendants tracked each of the claims asserted in the Complaint and Plaintiffs' Motion and explained in detail why Plaintiffs cannot prove their standing to maintain this action, *see* Defs. Mem. at 16-27, or the merits of their claims, *see id.* at 27-47, and that Defendants cannot adequately defend against Plaintiffs' claims or Motion, *id.*, without information subject to the state secrets privilege (and thus why Plaintiffs' Motion must be denied). In this key respect, Defendants' present submissions constitute their response—indeed, they are Defendants' only possible response at this juncture if the state secrets privilege is to be given any effect—to

Plaintiffs' Motion.[24]

Finally, Defendants' submission is consistent with Federal Rule of Civil Procedure 56(f), which expressly contemplates deferring adjudication of the merits of a summary judgment motion where it appears "from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition." In such circumstances, "the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just." Fed. R. Civ. P. 56(f) (emphasis added). Here, the classified and unclassified declarations of Director Negroponte and Major General Quirk clearly explain that Defendants cannot present facts "essential to justify [their] opposition," because to do so would require disclosing the very information that the state secrets privilege is designed to protect, *see Reynolds*, 345 U.S. at 8, and would thereby result in exceptionally grave damage to the national security. Thus, in this respect as well, Defendants' submissions demonstrate why Plaintiffs' Motion could not be granted.

Accordingly, because Defendants' submissions filed in support of their privilege assertions and Motion to Dismiss are the only response to Plaintiffs' Motion possible at this juncture, and because consideration of the issues raised by Defendants logically precedes any attempt to decide the merits of Plaintiffs' claims, Defendants respectfully request that the Court resolve the threshold issues raised by Defendants' submissions prior to any adjudication of the merits of Plaintiffs' Motion.

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[24] Defendants also note that declining to adjudicate the merits at this stage is consistent with other fundamental principles. For example, it is well established that the Court must consider jurisdictional issues such as standing before proceeding to the merits of any claim. *See, e.g., Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 583 (1999) ("Article III generally requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of the case."). Moreover, just recently, the Supreme Court held that a court should first consider threshold issues raised by the applicability of a rule barring adjudication relating to secret espionage agreements—a principle equally applicable to the state secrets privilege. *See Tenet v. Doe*, 544 U.S. 1, 6 n.4 (2005). Judicial economy and constitutional avoidance principles also warrant initial consideration of Defendants' submissions. *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (noting the Supreme Court's "deeply rooted commitment not to pass on questions of constitutionality unless adjudication of the constitutional issue is necessary.").

CONCLUSION

For the foregoing reasons, the Court should uphold the assertion of the state secrets privilege and related statutory privileges by the United States and grant Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment.

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Respectfully submitted,

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